



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO.383 OF 2006

IN THE MATTER OF THE ESTATE OF NICHOLAS KIPTUM - (DECEASED)

VIOLET KHASOHA MUSITIA.....1ST APPLICANT

SILIYA KHASIALA.....2ND APPLICANT

VERSUS

MARY NYOKABI.....1ST RESPONDENT

HELLEN MUSIMBI MUSILA.....2ND RESPONDENT

JUDGMENT

1. The 1st Petitioner is the daughter of the late NICHOLAS KIPTUM MUSITIA (Deceased) and the 2nd petitioner is the mother of the said deceased.
2. The two objectors brought this application under provisions of **Rule 44(1)** of the **Probate and Administration Rules** of the **Law of Succession**.
3. The orders they seek are as set out hereunder:
 - i. That the grant of Letters of Administration issued to VIOLET KHASOHA MUSITA and CYCIA KHASIALA KIPTUM made on the 3rd May, 2001 be revoked or annulled.
 - ii. Costs be provided for
4. The grounds the objectors rely on for revocation or annulment of the Grant are that the petitioners' fraudulently concealed from the court material facts, being that the objectors were wives of the deceased.
5. The petitioners also concealed from the court the existence of an oral will made by the deceased in which the objectors were beneficiaries to the deceased's estate.
6. That the petitioners excluded the objectors from the list of beneficiaries and also failed to indicate that the estate had liabilities.
7. On the 16th May, 2005 directions were given by Justice Dulu that the application do, proceed for hearing by way of *viva voce* evidence.
8. The matter proceeded for hearing and was part heard by Justice Ibrahim (as he then was). The

objectors testified and called one witness and the petitioners both testified and called three witnesses. By the time this court was seized of the matter, only one witness remained to testify, that it D.W.5

ISSUES FOR DETERMINATION

9. After reading the typed court proceedings and after hearing the evidence of D.W.5, this court finds the following issues for determination:

- i. Oral will – and its validity.
- ii. Fraudulent concealment of material facts from the court.
- iii. Dependency
- iv. Revocation or annulment.
- v. Costs.

10. On the first issue, the law on oral wills is provided for under **Section 9(1)** of the **Law of Succession**. The section provides for the validity of an oral will if it is made before two or more witnesses and the testator dies within a period of three (3) months from the date of making of the will.

11. The evidence of D.W.4, CHRISTOPHER KOECH was that he was called by the deceased on the 2nd December, 2000 in the night about 7.00p.m. And in the presence of the 2nd Petitioner his mother, the 2nd objector and two witnesses, the deceased made the purported oral will and proceeded to distribute his properties.

12. It is not in dispute that the deceased passed on the 18th January, 2001 and the 2nd objector depones to this fact at paragraph 5 of her affidavit made on the 9th July, 2001.

13. There is also a Certificate of Death in the court file that is annexed to the petition. That confirms that the deceased died on the 18th January, 2001.

14. This court is satisfied that there is evidence that the deceased died before three (3) months had lapsed.

15. This court therefore finds that there existed a valid oral will made by the deceased.

16. On the second issue, it is the objectors' contention that the petitioners fraudulently concealed the fact that the objectors were the wives of the deceased and also beneficiaries of the estate of the deceased.

17. The evidence of D.W.5 was that the 2nd petitioner, (the mother of the deceased) that she was present when the deceased made his oral will and distributed the properties.

18. In her evidence, D.W.2 (the 2nd petitioner) recalled being called to the deceased's bedroom and she recalls that D.W.5 was present on that occasions. The witness denied that the deceased made a will and that he distributed his property. She only recalls that the deceased named all his children on that material date.

19. Having considered the evidence of D.W.5 who was the petitioners' witness, this court is satisfied that the petitioners, particularly the 2nd petitioner knew of the existence of the deceased's oral will and concealed this material fact.

20. The evidence of the 1st objector was that she was married to the deceased under Tiriki Customary

Law and the called P.W.2 to testify on her behalf and he corroborated her evidence and produced an agreement and the same was marked as (P Exh.1).

21.The petitioners did not dispute this fact but only contended that at the time of death of the deceased, the two had separated.

22.At **Section 29** defines a dependant as:

“29(a) The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

23.From the evidence adduced by the 1st objector and the petitioners, it is not in dispute that the 1st objector and the deceased stopped staying together but the dowry was never returned, therefore there was no divorce which would then mean the two were still husband and wife.

24.This court find that the 1st objector is a dependant of the deceased.

25.The 2nd objector's evidence in a nutshell is that she co-habited with the deceased from 1995 to 2001 and were blessed with one issue a son - BYRSON KIPTUM.

26.The witness in evidence stated that she made major contributions directly towards the deceased's property.

27.The evidence of D.W.5 who is the petitioners' witness testified and confirmed in evidence that the 2nd objector was mentioned as a wife and beneficiary in the oral will made by the deceased.

28.It is also not in dispute that the 2nd objector resides and continues to reside on the property where the deceased's remains were interred.

29.From the evidence adduced, it is evident that the petitioners knew that the deceased had these two wives but deliberately excluded them from the list of beneficiaries of the estate of the deceased.

30.The evidence of P.W.2 and D.W.5 confirms that the deceased was polygamous and the evidence of D.W.5 supports the fact that the deceased made reasonable provision for the petitioners, the objectors and the other beneficiaries vide the oral will.

FINDINGS:

1. This court has been convinced and finds that the Grant was procured by concealment from the court of a material fact, to wit that the objectors were beneficiaries to the Estate of the deceased.
2. Although the court finds the objectors' application has merit, the order sought is discretionary and it is upon the court to grant and make orders that are just and fair. This court therefore, shall not revoke the grant.
3. The court finds that the oral will disposed of most of the properties and this court has no mandate at this stage to question the validity of the disposition nor interfere with the same.
4. This court concurs with the submissions of the objectors that the Estate of the deceased is depleted, save for only one property, namely five acres at Ngoisa.
5. This court orders the petitioners to commence proceedings for confirmation of the Grant with regard to this sole property.

6. The application for confirmation shall be made within forty-five (45) days from the date hereof, in default, the Grant shall stand revoked.
7. The objectors, as beneficiaries, be and are hereby allowed to make their case for distribution of a share of this sole property.
8. On the issue of costs, as the parties are all related, therefore, the court orders that each party shall bear their own costs.

It is so ordered.

Dated and Signed at Eldoret this 29th day of April, 2013.

MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 29th day of April, 2013. Hon. Justice Fred A. Ochieng.

JUDGE